88-1655

NO.

Supreme Court, U.S.
FILED
MAR 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1988

REGINO FLORES,

Petitioner

vs.

DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION

Respondent,

and

SANDRA POWELL,

Respondent.

PETITION FOR CERTIORARI
TO THE DISTRICT OF COLUMBIA
COURT OF APPEALS

Regino Flores
714 13th St., N.E.
Washington, D.C. 20002
(202) 399-5034
Pro Se

QUESTION PRESENTED FOR REVIEW

1) Whether Petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated when the District of Columbia Court of Appeals ruled that a D.C. Municipal Regulation automatically denying a motion for reconsideration upon the expiration of a fifteen (15) day time period, without written or oral notice, commenced the running of the time in which to appeal to the court under its local rule.

a) Whether the Court erred when it ruled that Petitioner's petition was untimely because it was not filed within thirty days of the D.C. Agency's automatic denial which gave no actual notice to petitioner that the thirty day time period had commenced to run.

List of Parties

Regino Flores

Sandra Powell

The District of Columbia

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STATUTES AND RULES

28 U.S.C. 2101

D.C. Code § 1-1509 (c)

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14 DCMR § 3313.1

D.C. Court of Appeals Rule 15 (a)

Fifth Amendment to the United States Constitution

Fourteenth Amendment to the United States Constitution

REPORT OF OPINION

The opinion of the D.C. Court of Appeals is reported as Case No. 86-78.

JURISDICTIONAL GROUNDS

(i) The date of the judgement sought to be reviewed is September 29, 1988.

(ii) The date of the order overruling rehearing is January 10, 1989.

(iii) The statutory provision believed to confer jurisdiction on this Court 28 U.S.C. 2101, 1257 et seq.

STATUTES & RULES INVOLVED

The statutes and rules involved in this case are contained in the body of this Petition.

The opinion of the D.C. Court of Appeals is attached as Appendix A.

The opinion of the D.C. Rental Housing Commission is attached as Appendix I.

STATEMENT OF THE CASE

A. Course of Proceedings and Deposition in Court below:

On January 17, 1986, petitioner Flores filed a petition for review in the District of Columbia Court of Appeals from a final agency decision of the D.C. Rental Housing Commission (hereinafter the "RHC" agency). The "RHC" filed a motion to dismiss the petition as untimely. On September 29, 1988, the D.C. Court of Appeals issued a decision dismissing the petition as untimely. On October 11, 1988 petitioner filed a petition for rehearing or rehearing En Banc specifically requesting a reversal of the court's decision dismissing the petition. The D.C. Court of Appeals issued a decision on January 10, 1989, denying the petition for rehearing or rehearing en banc.

STATEMENT OF CASE

Tenant-Intervenor, filed a complaint on November 14, 1984, with the Rental Accommodations and Conversion Division of the District of Columbia Department of Consumer and Regulatory Affairs (hereinafter referred to as the "RACA"). Intervenor alleged, among other things that the Petitioner-Landlord failed to file proper rent increase forms with the Rental Accommodation Office. On January 24, 1984, a decision was issued by a "RACD" Hearing Examiner dismissing the complaint for lack of jurisdiction of the intervenor's claim.[1] The intervenor appealed the

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[1]The Hearing Examiner ruled that the petitioner's property (a four (4) unit building) was exempt from Title II of the Rental Housing Act of 1980.

decision, and/or requested reconsideration of the Examiner's decision. The motion was granted by the Commission on October 24, 1984, and the case was remanded to the Examiner for reconsideration.

On December 17, 1984, a second decision and order was issued by another examiner finding that the petitioner violated the rent ceiling for the subject four (4) unit rental property. The Examiner ruled that the landlord owned a total of ten (10) rental units, and that said units were subject to the rent control laws of the District of Columbia. The Petitioner was ordered to refund $4,253.00 from the date of occupancy by the intervenor, March 1, 1982.

On January 7, 1985, Petitioner filed an appeal of the December 17, 1984, Examiner's decision. The Rental Housing Committee issued a decision on July 11, 1985, affirming the Hearing Examiner's decision of

December 17, 1984, finding that the petitioner had violated the rent ceiling on the subject property. On August 27, 1985, a compliance order was issued by the D.C. Department of Consumer and Regulatory Affairs finding the petitioner liable for failing to comply with the Examiner's decision.

Petitioner, Flores filed a Motion for Reconsideration and/or Issuance of a New Commission Decision Date on October 24, 1985. On October 29th intervenor filed an opposition to Petitioner's Motion for Reconsideration. The Commission granted the Petitioner's Motion, and re-issued the subject decision.

On November 4, 1985, the Respondent ("RACA") re-issued its order of July 1985, notifying petitioner of his right to "seek reconsideration or judicial review of the Commission's July 11, 1985 Decision and

Order." On November 12, 1985, the Intervenor filed a Motion for Reconsideration of the Commission's Decision to re-issue its Order of July 11, 1985.

On November 15, 1985, Petitioner Flores filed a Motion for Reconsideration of the Commission's July 11th Decision (which was re-issued on November 4th) and Motion to Stay the Hearing Examiner's Decision Pending Final resolution of this Case.[2] On December 11, 1985, the intervenor filed an opposition to petitioner's Motion of November 15th.

The respondent issued a written Order on November 18, 1985 denying the intervenor's

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[2]Petitioner's Motion for Reconsideration addressed the merits of the DCRA's decision and to this date, the DCRA has failed to issue a formal Order or Decision addressing the issue raised or otherwise disposing of petitioner's motion by written notice.

Motion of November 12th requesting reconsideration of the respondent's decision to re-issue the original decision. The respondent also sent two letters to the parties dated December 12, 1985 and December 16, 1985 denying the intervenor the opportunity to file "post-hearing submissions."

On January 9, 1985, the Respondent ("DCRA") issued a "Notice of Hearing on Appeal" and forwarded the same to all parties. Petitioner's Counsel contacted the respondent immediately after receiving the January 9th Notice and he was informed that there would be no hearing in the matter, and that the letter of January 9, 1986 was sent in error. He was further advised by agency representatives to proceed to the D.C. Court of Appeal.

Petitioner filed a petition for review on January 17, 1986, nine days after

receiving the Notice of Appeal, and seven days after being instructed by the respondent to seek judicial review. Subsequently, petitioner received a "Cancellation of Notice of Hearing on Appeal" dated January 28, 1986.

On February 25, 1986, respondent filed a Motion to Dismiss the Petition for Review, and the petitioner subsequently filed his opposition to respondent's Motion. On March 19, 1986, D.C. Court of Appeals issued an Order directing the parties to file briefs in support of and in opposition to the aforementioned motions.

ARGUMENT AND AUTHORITIES

I. Whether Petitioner's due process rights under the Fifth and Fourteenth Amendment to the United States Constitution were violated when the District of Columbia Court of Appeals ruled that a D.C. Municipal regulation automatically denying a motion for reconsideration upon the expiration of a fifteen (15) day time period, without written or oral notice, commenced the running of the time in which to appeal to the court under its local rule..

The D.C. Court of Appeals decision violated petitioner's due process rights under the Fifth and Fourteenth Amendment to the U.S. Constitution when it ruled that a D.C. Municipal Regulation (14 D.C.M.R. § 33131) automatically denying petitioner's motion for reconsideration, (without written or oral notice) after expiration of a fifteen (15) day time period, commenced the time in which petitioner had to appeal a D.C. administrative decision to the D.C. Court of Appeals. As a result of the Court's error, petitioner's petition for

review was held to be untimely, thus preventing petitioner's case from being heard on the merits.

In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950), this Court recognized that prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Invoking this "elementary and fundamental requirement of due process," ibid, the Court held that published notice of an action to settle the accounts of a common trust fund was not sufficient to inform beneficiaries of the trust whose names and addresses were known. The Court explained that notice by

publication was not reasonably calculated to provide actual notice of the pending proceeding and was therefore inadequate to inform those who could be notified by more effective means such as personal service or mailed notice.

The Mullane case is distinguished from the instant proceedings in that Mullane involved publication of notice through a local newspaper, while petitioner Flores received no written or oral notice informing him of the D.C. Agency's decision automatically denying his petition for reconsideration after the expiration of fifteen (15) days. The respondent argues that notice was given by publication of the municipal regulation by virtue of its declaration that "Failure of the Commission to act within the fifteen (15) day time period set forth in § 3320.5 shall constitute a denial of the motion for

reconsideration." However, respondent's argument is not well taken. There are a number of reasons by the respondent's argument lacks merit. The regulation in question provides in pertinent part that:

> 3320.5 The Commission shall either grant or deny the motion within fifteen (15) days of receipt.
>
> 3320.6 Failure of the Commission to act within the fifteen (15) day time period set forth in §3320.5 shall constitute a denial of the motion for reconsideration.
>
> 3320.7 If the motion for reconsideration is granted, the Commission shall affirm, rescind, or modify its order.
>
> 3320.8 The filing of a motion for reconsideration shall act as a stay upon the effectiveness of the Commission's order until such time as the motion is ruled on by the Commission, or denied because of

the failure of the Commission to act under §3320.6.

First, the regulation states that the Commission shall either grant or deny the motion within fifteen days, and it further provides that failure of the Commission to act within fifteen days would constitute a denial of the motion for reconsideration. Such language indicates the type of final decision which may be reached by the Commission regarding its decision on the pending motion for reconsideration, but it clearly cannot constitute notice of that final decision for purposes of triggering the limitations period in which to seek judicial review.

Second, the regulation is ambiguous and misleading in that §3320.7 provides that "If the motion for reconsideration is granted, the Commission shall affirm, rescind, or

modify its order." The language of §3320.7 leads the reader to presume that some form of actual notice will be given if the motion is granted. Further §3320.8 provides that "a motion for reconsideration shall act as a stay upon the effectiveness of the Commission's order until such time as the motion is ruled on by the Commission. ..." Therefore, it is reasonable to assume that actual notice would be given if the agency's decision was to automatically deny the motion.

In the case of City of New York v. New York, New Haven & Hartford Railroad Co., 344 U.S. 293 (1952), Justice Black, who delivered the opinion of the court, noted that, "Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice." The facts in the City of New York case revealed that the City of New York failed to file lien claims against

the railroad which had reorganized pursuant to §77 of the Bankruptcy Act. The lien claims arose from local improvements made by the city to railroad realty prior to the reorganization. The District Court issued an order directing "creditors" to file their claims by a prescribed date. The order was published in five daily newspapers, but the City of New York received no actual copy of the District Court order. The District Court enjoined the City of New York's lien claims because they were not filed, and the Court of Appeals affirmed the same. The City of New York sought and was granted a writ of certiorari, principally on the issue of whether in the absence of actual service of notice on the city, the court was without power to forfeit the city's liens because of its failure to appear as a claimant.

The Supreme Court ruled that the Bankruptcy Act required actual notice of the

order to creditors requiring the filing of creditors claims, and the court determined that notice by publication was insufficient. Specifically, the court held in pertinent part that:

> "Section 77 (c)(8) of the Act states that "The judge shall cause reasonable notice of the period in which claims may be filed, ... by publication or otherwise." 11 U.S.C. §205 (c)(8). We hold that publication of the bar order in newspapers cannot be considered "reasonable notice" to New York under the circumstances of this case.
>
> Notice by publication is a poor and sometimes a hopeless substitute for actual service of notice. Its justification is difficult at best. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306. But when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication, See, e.g., Standard Oil Co. v. New Jersey, 341 U.S. 428. The

> case here is different. No such excuse existed to justify subjecting New York's claims to the hazard of forfeiture arising from "constructive notice" by newspaper. In the first place subdivision (c)(4) of §77 is designed to enable the court to serve personal notices on creditors."

Here, just as in the City of New York case, the respondent, D.C. Government was aware of the home address of petitioner Flores, but at no time was petitioner Flores given actual notice of the respondent's final decision denying petitioner's motion for reconsideration and lifting a stay of the agency's earlier decision. Petitioner was left to decipher the fact that publication of the city's ordinance discussing "automatic denials" constituted notice to affected parties. Petitioner Flores maintains that the District of Columbia Court of Appeals decision reaching

such a conclusion is violative of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. The respondent failed to give actual notice of the agency decision automatically denying petitioner's motion for reconsideration, yet the respondent issued a written order notifying the intervenor that her motion for reconsideration had been denied. Failure to provide such actual notice to the petitioner for purposes of triggering commencement of the time period within which to seek judicial review of the agency's decision was also violative of the due process clause as it is applied to D.C. Court of Appeals Rule 15(a).

Third, the D.C. Court of Appeals decision denied the petitioner due process because its decision improperly concluded that the regulation in question (D.C.MR. §3320.5) provided notice of an automatic

denial through publication of the government's regulation in the District of Columbia Register. The D.C. Court of Appeals decision was in error because it was in violation of the notice requirements set forth in the District of Columbia Code, Title 1, Section 1509(e) (Administrative Procedure Act), which provides in pertinent part that:

> "Every decision and order adverse to a party to the case rendered by the Mayor or an agency is a contested case shall be in writing and shall be accompanied by findings of fact and conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by and in accordance with reliable, probative, and substantial evidence. A copy of the decision and order and accompanying findings and conclusions shall be given by the Mayor of the agency, as the case may be, to each party or to his attorney of record. (Emphasis added)

In the instant case, the "automatic denial" of the petitioner's motion for reconsideration represented a decision or order of the respondent agency. As such, the agency was required to give a copy of the order denying the motion to each party in accordance with law. However, petitioner was not served personally or by mail with actual notice of an order automatically denying his motion. (See and compare a copy of the order dated November 18, 1985, denying the intervenor's motion for reconsideration). Lack of compliance with D.C. Code 1-1509(e) illustrates the violation of procedural due process by the respondent.

The agency clearly violated D.C. Code 1-1509(e) when it failed to serve a written copy of the order on the petitioner or his counsel. Therefore, the thirty (30) day time period for filing a petition for review

should not have commenced to run. Therefore, the D.C. Court of Appeals chose to ignore the plain language of the D.C. Administrative Procedure Act which governs the requirements of agency action, in favor of the agency's own municipal regulation (D.CM.R. §3320.5). The D.C., Court of Appeals acted in complete disregard of the due process standards incorporated in its own "state" statute or its equivalent, the D.C. Code.

The above analysis of the D.C. Court of Appeal's improper action can be summarized by the Court's holding in a somewhat different and distinguishable case, Civil Aeronautics Board v. Delta Air Lines, Inc., 376 U.S. 316 (1960). The Court ruled that once a certificate of public convenience and necessity granted by the Civil Aeronautics Board to an air line has become effective under §401(f) of the Federal Aviation Act of

1958, the Board may not alter it without formal notice and hearing, even though the Board, at the time of certification, has purported to reserve jurisdiction to make summary modifications pursuant to petitions for reconsiderations. ...

The Court summarized its decision by stating "that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do. See United States v. Seatrain Lines, 329 U.S. 424, 433. CF. Delta Air Lines v. Summerfield, 347 U.S. 74, 79-80." Although the Civil Aeronautics case relates to a federal statute, the case is analogous to the instant case because it declares what powers a court is vested with at its appropriate level - be it local, state or federal. The D.C. Court of Appeals in the instant case chose to ignore its local

legislative intent (D.C. Code §1509(e), in favor of an agency regulation which was and is repugnant to and violative of the due process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Supreme Court further concluded in Civil Aeronautics Board, supra that:

> "Thus a court considering the timeliness of a litigant's appeal is concerned with the wisdom of exercising its own power to act, and the result depends on such factors as fairness to the appellant and the intent of Congress in passing a general statute - §10(c) of the Administrative Procedure Act - which applies equally to almost all administrative agencies. ..."

a. Whether the Court erred when it ruled that Petitioner's petition was untimely because it was not filed within thirty days of the D.C. Agency's automatic denial which gave no actual notice to the petitioner that the thirty day period had commenced to run.

In the instant case, the D.C. Court of Appeals chose to ignore its earlier decisions requiring actual notice of agency decisions, in favor of an agency regulation requiring no such notice. The Court's action also clearly ignored the due process standards built into its own Court Rule 15(a), in favor of an "expedient means" by which to cut the agency's case load at the expense and unfairness to the petitioner.

Therefore, the D.C. Court of Appeals decision not only violated petitioner's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution, but it also violated due process provisions of the D.C. Administrative Procedures Act, and it disregarded formal notice requirements of earlier Court decisions.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's Petition for a Writ of Certiorari be granted. Petitioner further requests the Court to reverse and remand the judgement of the D.C. Court of Appeals, and hear this case on it merits.

Respectfully Submitted,

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Pro Se

APPENDIX I

DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION
North Potomac Building, Suite 505
614 H St., N.W.
Washington, D.C. 20001

(202) 727-7400

November 4, 1985

REGINO FLORES
c/o Frazer Walton, Jr., Esq.
555-4th Street, N.W., No. 333
Washington, D.C. 20001

Landlord-Appellant

v. In Re: TP 11,258

SANDRA POWELL
4353 Martin Luther King Avenue, S.W.
Washington, D.C. 20032

Tenant-Appellee

ORDER

The landlord-appellant has filed a motion requesting the Commission to re-issue its Decision and Order of July 11, 1985. Appellant contends, as the basis for his

request, that the July 11, 1985, decision was not a final, i.e. appealable, decision because it did not contain a statement of appellant's right to seek judicial review. He seeks the re-issuance of the decision to include such a statement with a new date of issuance.

We find appellant's contention without merit. Appellant's right to seek judicial review of our decisions is established by statute, [1/] and the time period for seeking such review is fixed by rule of the

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[1/] D.C. Code §45-1530.

[2/] Rule 15 of the District of Columbia Court of Appeals requires that an appeal of agency decision be filed "within thirty days after notice is given. . . If the order or decision is made out of the presence of the parties and notice thereof is by mail, the petitioner shall have five additional days from the date of mailing."

District of Columbia Court of Appeals.[2/] The time of accrual of party's right to appeal a decision served by mail is dependent upon the agency's mail practices.[3/] But it is nowhere suggested by statute, regulation or decision[4/] that the Commission is required to give a party notice of his right to appeal, or that the accrual of this right must await receipt of such notice.

Since we find nothing in law which requires such a notice, or supports appellant's contention that a decision lacking this notice is not final or appealable, appellant's contention, and his motion based on that contention, must therefore be denied.

3/ Town Center Management v. D.C. Rental Housing Commission, D.C.C.A. No. 84-1451 (August 1, 1985).

4 The case law cited by appellant is in no way controlling.

Our review of the record, however, raises a different defect from that raised by appellant. It appears that the landlord-appellant was represented by counsel, albeit a different counsel, at the Commission's hearing on March 19, 1985. But the record also indicates that the decision issued as a result of that hearing on July 11, 1985, was not mailed to the landlord's counsel of record as required by the Commission's regulations.[5/] Rather, the mail log shows that the decision was mailed directly to the landlord as if he had proceeded in this matter pro se.

Here the landlord had gone to the trouble and presumably the expense of obtaining legal representation, and he had put us on notice of that representation. We are bound to respect his designation of

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5/ 14 DCMR §§ 3115.2, 3315.4.

representation; we would require that of the opposing party and can require no less from ourselves.

We are not persuaded that the "actual notice" given to the landlord can be construed as "constructive notice" to his counsel, or that it cures the non-compliance with the applicable regulations on service. Among the functions that counsel is retained to perform is the function of relieving the landlord of being alert to and receiving official papers, and noting (or knowing) deadlines which those papers may trigger. We cannot deprive the landlord of this service by by-passing counsel of record.

We are mindful of the D.C. Court of Appeals' decision in Smith et ux v. D.C. Rental Accommodations Commission, 411 A.2d 612 (1980), to the effect that the time period for filing an appeal is jurisdictional and cannot be extended by the

Commission.[6/] However, we do not run afoul of Smith, because the time for appeal does not begin to run until notice of the decision is properly given to the parties. In this case, notice of the decision should have been given to the landlord's counsel of record to begin the appeal period. See Town Center Management, supra, note 3; James S. Woods v. Ralph D. Kaiser Co., TP 11,937 (RHC October 23, 1985). This was not done. Since the appeal period did not begin to run, we are not extending it.

The defect which we find in the issuance of the July 11, 1985 Commission decision is not that urged by appellant, i.e. that it contained no notice of

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6/ In Smith the appeal period in question referred to a Rent Administrator's decision and was fixed by statute. Here the period is set by Court rule, but is nonetheless jurisdictional and beyond our authority to alter.

appellant's right to appeal. Rather, the issuance of that decision was defective because it was not mailed to appellant's then counsel of record.

To correct this latter deficiency, it is by the Commission, this 4th day of November, 1985,

ORDERED, that the Commission's Decision and Order, issued July 11, 1985, in this matter shall be deemed to have been issued on the date of issuance of this Order; and it is further

ORDERED, that the service by mail of this Order on the present counsel to the parties shall constitute and be deemed as service of the Decision and Order issued July 11, 1985; and it is further

ORDERED, that the time for the parties to seek reconsideration or judicial review of the Commission's July 11, 1985, Decision

and Order shall be computed from the date of issuance and mailing of this Order.

Isiah T. Cresswell, Jr.
Commissioner

This order was mailed this 4th day of November, 1985.

Copies To:

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Rick Hannibal
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APPENDIX A

District of Columbia
Court of Appeals

No. 86-78

REGINO FLORES,

Petitioner,

v.

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION,

Respondent

and

SANDRA POWELL,

Intervenor.

BEFORE: *Rogers, Chief Judge; *Mack, Newman, *Ferren, Belson, Terry, Steadman, and Schwelb, Associate Judges.

O R D E R

On consideration of petitioner's petition for rehearing or rehearing en banc, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that a majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Associate Judges Mack and Schwelb would grant the petition for rehearing en banc.

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Charles L. Reischel, Esquire
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Washington, D.C. 20009

das

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 86-78

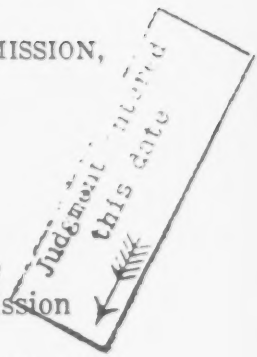
REGINO FLORES, PETITIONER,

v.

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION, RESPONDENT,

and

SANDRA POWELL, INTERVENOR.



Petition for Review of a Decision of the District of Columbia Rental Housing Commission

(Argued December 17, 1987 Decided September 29, 1988)

Frazer Walton, Jr. for petitioner.

Donna M. Murasky, Assistant Corporation Counsel, with whom *Frederick D. Cooke, Jr.*, Acting Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel, were on the brief, for respondent.

Richard A. Hannibal was on the brief for intervenor.

Before MACK, FERREN, and ROGERS, *Associate Judges*.

Opinion for the court by *Associate Judge* ROGERS.

Dissenting opinion by *Associate Judge* MACK at p. 12.

ROGERS, *Associate Judge*: Regino Flores appeals from the decision of the District of Columbia Rental Housing

Commission (RHC) upholding an award of damages to his former tenant, intervenor Sandra Powell, for rent charged in excess of the legal rent ceiling for her apartment on the ground that he is within the small landlord exemption of the Rental Housing Act of 1980. The complex procedural history of this case presents the issue whether the agency's rule automatically denying a motion for reconsideration upon the expiration of a set time starts the running of the time to appeal under D.C. App. R. 15 (a). We agree with the RHC and Ms. Powell that this court is without jurisdiction to hear the appeal because Flores' petition for review was untimely filed. The time to file an appeal commenced to run under Rule 15 (a) when, under RHC regulations, Flores' motion for reconsideration by the RHC was automatically denied upon the expiration of fifteen days. Since his petition for review was not filed until thirty-nine days later, even granting to him an additional five days because the denial occurred out of his presence, his petition is untimely and, accordingly, the appeal must be dismissed.

I.

Ms. Powell filed a tenant petition with the Rental Accommodations and Conversion Division (RACD) on November 14, 1983.[1] Among her complaints was that she was being charged monthly rent of $275.00 for an apartment with a rent ceiling of $150.00. After a hearing, the hearing examiner dismissed her petition on the ground

[1] The law governing the instant case is the Rental Housing Act of 1980, D.C. Law 3-131, 28 D.C. Reg. 326 (Jan. 23, 1981), *codified as amended*, D.C. Code §§ 45-1501 *et seq.* (1981) (the Act). This legislation became effective on May 1, 1981, and expired on April 30, 1985. D.C. Law 3-131, §§ 906, 907, D.C. Code §§ 45-1596, -1597 (1981).

that the four-unit building at 400 Melon Street, S.E., in which Ms. Powell's apartment was located, was exempt from the rent control act because Flores had filed a claim of exemption as a small landlord.

Ms. Powell filed a *pro se* appeal, stating that she had discovered that Flores owned additional rental units. On advice of counsel, she subsequently moved to amend her notice of appeal to a motion for reconsideration. The RHC granted the motion for reconsideration, and by order dated October 24, 1984, vacated the hearing examiner's decision and remanded the case for a hearing on whether Flores was within the small landlord exemption of the Act.

On December 17, 1984, a second hearing examiner found that Flores owned two housing accommodations containing ten rental units and that he had failed to register them as required by D.C. Code § 45-1516 (d) (1981). The examiner therefore ruled that Ms. Powell was entitled to recover the difference between the rent she had paid and the "base rent"[2] for her apartment plus interest.

Flores appealed from the second hearing examiner's decision, and after a hearing, the RHC, by order dated July 11, 1985, affirmed the examiner's decision on an alternative ground. It ruled that Flores should have removed his property from the rental housing market pursuant to D.C. Code § 45-1561 (d) (1981), which permits a landlord to recover possession of a rental unit for his own immediate and personal use as a dwelling.[3] Because

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[2] D.C. Code § 45-1503 (2) (1981) ("base rent").

[3] D.C. Code § 45-1561 (d) provides in pertinent part:

> A natural person with a freehold interest in the rental unit may recover possession of a rental unit where he or

Flores had not done so, the RHC held that he remained subject to the Act.

On September 30, 1985, Flores' attorney sent a letter to the RHC requesting it to reissue its July 11 order so that he might file a timely appeal. The request was based on the grounds that the order had contained neither notice of Flores' right to appeal the RHC's decision nor information concerning the time limits on the filing of a notice of appeal. Flores asserted that he had been unaware of his right to appeal until he sought the advice of his present attorney. His counsel also requested a copy of the decision within ten days and that the RHC advise him of the appropriate judicial forum in which to seek review.

Having received no response to his letter, Flores filed a motion on October 24, 1985, for reconsideration of the July 11, 1985, decision or for "issuance of a new commission final agency decision date," essentially repeating the arguments made in his letter. The RHC rejected the arguments relating to lack of notice of the opportunity for judicial review as meritless, since the right to judicial review of the RHC's decision was established by statute, *see* D.C. Code § 45-1530 (1981), but nonetheless granted the motion because the July 11 order had been sent directly to Flores, rather than to his attorney of record, in violation of RHC regulations. *See* 14 DCMR §§ 3115.1, 3115.2, 3115.4 (1985). Accordingly, the RHC reissued its July 11, 1985, decision by an order dated and mailed on November 4, 1985. The new order stated that the time to seek reconsideration or to petition for review was to run from November 4, 1985.

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she seeks in good faith to recover possession of such rental unit for his or her immediate and personal use and occupancy as a dwelling.

On November 13, 1985, Ms. Powell filed a motion for reconsideration of the RHC's decision to reissue its July 11 decision. Two days later, Flores moved for reconsideration of the merits of the July 11 decision. These two motions tolled the time for filing a petition for review with this court. *See* D.C. App. R. 15 (b). The RHC denied Ms. Powell's motion by order dated November 18, 1985, and mailed the following day. The RHC never expressly acted on Flores' motion, however, and therefore pursuant to its rules, the motion was deemed automatically denied on December 9, 1985, that date being fifteen business days after it was filed. *See* 14 DCMR §§ 3313.1, 3320.6 (1985).[4] The record does not indicate that written notice of the denial was sent to Flores or his attorney, but on January 9, 1986, the RHC issued a Notice of Hearing on Appeal from the second hearing examiner's decision of December 17, 1984, advising that a hearing would be held on February 3, 1986. Flores states in his brief that upon receipt of the notice his attorney immediately contacted the RHC, was informed that the notice had been erroneously issued and that he could seek judicial review. He also states that he filed his petition for review in this court seven days later, on January 17,

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[4] 14 DCMR § 3313.1 (1985) provides:

> In computing any period of time prescribed or allowed by these rules, only business days shall be counted. Saturdays, Sundays, and legal holidays are excluded, as is the day in which the designated period of time begins to run.

14 DCMR § 3320.6 provides:

> Failure of the Commission to act within the fifteen (15) day time period set forth in § 3320.5 shall constitute a denial of the motion for reconsideration.

The RHS twice repromulgated these regulations on an emergency basis in 1985. *See* 32 D.C. Reg. 4,750 (Aug. 16, 1985); 32 D.C. Reg. 6,756 (Nov. 22, 1985).

1986. The RHC filed a motion to dismiss the petition as untimely, and on March 25, 1987, a motions division of this court referred the motion to the merits division, directing the parties to consider the effect of *Askin v. District of Columbia Rental Hous. Comm'n*, 521 A.2d 669 (D.C. 1987).

II.

At all times relevant to this case, D.C. App. R. 15 (a) has required that a party seeking judicial review of an agency decision must file a petition for review within thirty days after notice is given of the agency's decision or order.[*] If the decision is made out of the presence of the parties, the rule grants an additional five days from the date of mailing of the decision or order. The rule also provides that the time for filing a petition for review is tolled by filing a motion for rehearing or reconsideration with the agency. D.C. App. R. 15 (b). The

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[*] D.C. App. R. 15 (a) provides in pertinent part:

> *Petition for review of order; joint petition.* Review of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within thiry days after notice is given, in conformance with the rules or regulations of the agency, of the order or decision sought to be reviewed (unless an applicable statute provides a different time for filing said petition) and by tendering the prescribed docketing fee to the clerk. In the event the time prescribed by statute is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation unless the statute expressly provides otherwise. If the order or decision is made out of the presence of the parties and notice thereof is by mail, the petitioner shall have five additional days from the date of mailing . . . Filing may be accomplished by mail addressed to the clerk, but filing shall not be deemed timely unless the petition is received within the prescribed time period, accompanied by the appropriate fee . . . .

time for filing a petition begins when the agency gives notice of the denial of the motion for rehearing or reconsideration. *Id.* This court has held that the time limits of Rule 15 are mandatory and jurisdictional, and that "[o]nce the time prescribed by the rule has passed, we are without power to hear the case." *Totz v. District of Columbia Rental Hous. Comm'n*, 474 A.2d 827, 829 (D.C. 1984); *see also Glenwood Cemetery v. District of Columbia Zoning Comm'n*, 448 A.2d 241, 242 (D.C. 1982); *Conner v. District of Columbia Bureau of Motor Vehicle Servs.*, 442 A.2d 957, 958 (D.C. 1982).

RHC's regulations require the Commission either to grant or deny motions for reconsideration within fifteen days of their receipt. 14 DCMR § 3320.5 (1985). If the RHC fails to act within the prescribed time limit, the motion is deemed automatically denied. *Id.* § 3320.6, note 4, *supra*. Since Flores' motion was received by the RHC on November 15, 1985, it was automatically denied on December 9, 1985, fifteen business days after its receipt. *See id.* § 3313.1, note 4, *supra*. Even according an additional five days for mailing under D.C. App. R. 15 (a),[6] Flores was required to file his petition for review with this court by January 13, 1986, at the latest. However, this court did not receive his petition until January 17, 1986, and hence it was untimely.

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[6] In *Askin*, *supra*, the court noted, without deciding the issue, that in cases where the RHC automatically denied a motion, it might be appropriate to add a mailing period to the normal time limits of our rules. "The reasoning would be, perhaps, that it is only after that three-day period in which no notice granting reconsideration is received that a party may be confident that there has been a 'failure of the Commission to act' upon the motion, which shall thus 'constitute' its denial." *Askin*, *supra*, 521 A.2d at 675 n.15. In its brief, the RHC also views as appropriate the addition of the mailing period.

Attempting to avoid the consequences of untimeliness, Flores maintains that his petition should not be dismissed for two reasons. First, he argues that his petition for reconsideration is still pending before the RHC because the agency has taken no formal action regarding it. Second, he contends that the erroneous notice of January 9, 1986, created considerable confusion and ambiguity concerning the status of his motion for reconsideration, and therefore under *Askin*, *supra*, 521 A.2d 669, the court is required to resolve the ambiguity in his favor.

In *Glenwood Cemetery v. District of Columbia Zoning Comm'n*, *supra*, the court held that under a prior version of D.C. App. R. 15, which provided in subsection (b) that the period for filing a petition for review begins on the date that the party receives "formal notice," the time to appeal commences to run on the date formal notice is received by the parties, and not on the date the order is effective as a result of publication in the *District of Columbia Register*. 448 A.2d at 242; *see also Johnson v. District of Columbia Dep't of Employment Servs.*, 473 A.2d 398 (D.C. 1984). *Askin* applied *Glenwood Cemetery's* holding to the RHC rule at issue here, holding that where the agency had issued a formal notice after the petition had been denied automatically by expiration of time under the agency's rules and before the period to appeal the automatic denial had expired, it was the formal notice that controlled when time commences to run under Rule 15 (b). *Askin*, *supra*, 521 A.2d at 675. In that case the formal notice in no way implied that it was merely a confirmation of a previous automatic denial. *Id.* at 674. The court noted that it would resolve ambiguity between two orders in favor of the party seeking review. *Id.* at 675. The version of our Rule 15 (a) that applies in the instant case reads somewhat differently from our prior rule in that it does not

require "formal notice" and provides only that the notice must be "notice in conformance with the rules or regulations of the agency." This court has not yet had occasion to address whether an agency rule automatically denying motions for reconsideration by inaction starts the running of time to appeal under our Rule 15 (a).

The RHC's regulations concerning automatic denial of motions for reconsideration make explicit that no formal action is required and that the RHC's failure to act upon such a motion within fifteen days shall have the effect of a denial. Under its regulations, the RHC is required to act upon a motion for reconsideration within fifteen days of receipt of the motion. 14 DCMR § 3320.5 (1985). Should the RHC fail to take action, its rules provide that the motion is to be deemed denied. *Id.* § 3320.6. note 4, *supra*. Accordingly, even granting Flores the benefit of the five additional days for mailing, it should have been clear to Flores' counsel by December 14, 1985. that the RHC had denied his motion for reconsideration and that, therefore, the time for filing a petition for review in this court had started to run.[7]

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[7] In his reply brief, Flores contends that the RHC's regulations concerning automatic denial of motions for reconsideration should be held inapplicable to his case and declared unconstitutional. In Flores' view, 14 DCMR § 3320.6 conflicts with D.C. App. R. 15 (a) because it permits denial of a motion without "formal notice." Thus, he contends the RHC's regulation is "superseded" by this court's rule. This argument is meritless. Flores misquotes our rule; D.C. App. R. 15 (a) states only that the time for filing a petition for review begins to run upon receipt of notice, not "formal notice." In addition, the rule specifically states that the time limit for filing a petition for review begins to run after "notice is given[] in conformance with the rules or regulations of the agency . . . ." Rule 15 therefore requires only compliance with the agency's procedures regarding notice, and it does not attempt to im-

Nor can Flores benefit from the two-order ambiguity rule of *Askin*. He argues that he should not be required to comply with the time limits of D.C. App. R. 15 (a) because the erroneously issued notice of January 9, 1986, led him to believe that his motion for reconsideration was still pending before the RHC. However, the RHC clearly was required by its regulations to act upon Flores' motion for reconsideration within fifteen business days of its receipt. When the agency took no express action within the prescribed time period, the motion was automatically denied.[8] After the expiration of the fifteen

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pose any requirements as to the type of notice an agency is required to give.

Flores' argument that § 3320.6 is unconstitutional, because it was promulgated without due process and procedural safeguards, is likewise meritless. The RHC was authorized by statute to issue implementing regulations. D.C. Code § 45-1513 (a) (1) (1981). It is subject to the notice and comment procedures of D.C. Code §§ 1-1502 (3) & (4), 1506 (a) (1981), which include publication of proposed rules in the *District of Columbia Register*. *See* D.C. Code § 1-1532 (b) (1) (1981). The challenged regulation was duly published, *see* 30 D.C. Reg. 911, 940 (Feb. 25, 1983), and was adopted at a meeting of the RHC on October 11, 1983, taking effect upon publication in final form in the *District of Columbia Register*. *See* 30 D.C. Reg. 6179 (Dec. 2, 1983). Such notice and opportunity to comment are sufficient to satisfy the demands of due process. *See Williams v. Barry*, 228 U.S. App. D.C. 220, 222-23, 708 F.2d 789, 791-92 (1983).

[8] At oral argument, the court *sua sponte* raised the issue of whether the notice provisions of D.C. Code § 45-2526 (j) (1986 repl. vol.) were applicable and requested supplemental briefs from the parties. Having reviewed those briefs, the court concludes that the cited provision is inapplicable. The RHC's decision from which Flores seeks to appeal was not made under § 45-2526, for it was concerned solely with Flores' eligibility for the small landlord exemption.

days, and an additional five days for mailing, the time for filing a petition with this court began to run. Even if the RHC had intended to reconsider its prior order, it is without authority to extend the time limit for seeking review of its decisions in this court. *Cf. Smith v. District of Columbia Rental Accommodations Comm'n*, 411 A.2d 612, 614 (D.C. 1980) (intra-agency appeal). In addition, Flores' case is not analogous to *Askin* since here the RHC never issued a formal order denying reconsideration; hence the date of the automatic denial controls our jurisdiction. Under the court's rules, Flores was required to file his petition for review no later than January 13, 1986. He did not do so, and his petition is therefore untimely.[9]

Flores was represented by counsel throughout the administrative proceedings. He missed one opportunity to file a timely appeal and sought another. The RHC, acknowledging that it had failed to comply with its regulations, granted Flores' request. This occurred notwithstanding Ms. Powell's contentions that Flores' request for a stay of the November 4 order was untimely, that the RHC did not properly stay its July 11 decision, and that the RHC had already issued an order of com-

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[9] The dissent relies on decisions that were decided under the *former* version of Rule 15, which required "formal notice," and, hence, are not of assistance here. *See Askin, supra*, 521 A.2d at 673 n.9; *Glenwood Cemetery, supra*, 448 A.2d at 241. *Jackson v. District of Columbia Employee Compensation Appeals Bd.*, 537 A.2d 576 (D.C. 1988), also involves a Superior Court rule that, unlike our Rule 15(a), requires "formal notice." *Compare* D.C. App. R. 15 (a), quoted *supra* note 5, *with* Super. Ct. Agency R. 1 (a). Nor are the rules at issue misleading, as was contended in *Jackson*. The complex procedural history of the instant case arises not from any ambiguity relating to the RHC rules but from the failure of Flores' counsel to follow the rules.

pliance and fined Flores on August 27, 1985, for failure to comply with the RACD's December, 1984, decision. At no time has Flores contended either that he did not receive notice of the RHC's July 11 decision or that his counsel was unaware of that decision, of D.C. App. R. 15 (a), or of the agency's automatic denial rules for motions for reconsideration. Moreover, given the authority of the RHC to promulgate rules, counsel cannot avoid the effect of those rules as a result of ignorance or lack of diligence. *See White v. District of Columbia Bd. of Elections and Ethics*, 537 A.2d 1133, 1135-36 (D.C. 1988) (per curiam) (counsel charged with knowledge of agency rule concerning timing of election certification). *Cf. Lynch v. Meridian Hill Studio Apts., Inc.*, 491 A.2d 515, 518 (D.C. 1985) (duty of counsel to be aware of court's rules). Instead, Flores' counsel has simply been tardy in following through on his second opportunity to appeal the RHC's decision.

Accordingly, the petition for review is dismissed.

MACK, *Associate Judge*, dissenting: Rule 15 of this court provides that "[r]eview of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within thirty days after notice *is given*, in conformance with the rules or regulations of the agency . . . ." D.C. App. R. 15 (a) (emphasis added). The regulations of the Rental Housing Commission provide that a motion for reconsideration is automatically denied if not acted upon within fifteen (15) days. 14 DCMR § 3320.5 (1985). Today the majority holds that notice is *given* upon the "expiration" of a fifteen (15) day period.

In my view, this holding represents an overly restrictive application of our own rule, and a simplistic embrace of agency language, language that is ambiguous at best. At the same time, the holding ignores the plain language of our rule and is totally out of character with the rationale of our prior decisions favoring "formal notice," (*see Jackson v. Employees' Compensation Appeals Board*, 537 A.2d 576 (D.C. 1988); *Askin v. District of Columbia Rental Housing Commission*, 521 A.2d 669 (D.C. 1987); *Glenwood Cemetery v. District of Columbia Zoning Commission*, 448 A.2d 24[illegible] D.C. 1982)),[1] as well as the precept that it is important that ambiguity be removed from the notice context. *Askin*, *supra*, 521 A.2d at 675.

Without belaboring the point, "notice" is "notice"; in the legal sense, it may be "actual," "constructive," or "implied." I do not think we would argue, nor would it be desirable for us, jurisdictionally speaking, to suggest that the notice required by our rule is other than actual. Moreover, even if we could accept as a fact that the regulation in question puts a party on notice and that this is the notice contemplated by our rule (which it is not), the "complex procedural history" of which the majority speaks (or more aptly the confusion and ambiguity in this record) would, and does, present a poor vehicle for refusing jurisdiction.

There is nothing wrong with automatic denial of motions as an administrative procedure. However, where

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[1] The majority holding would appear to pose a direct conflict with our holding in *Jackson*. There is no indication, whatsoever, in rulemaking history that the omission of the word "formal" in the 1985 language was anything but stylistic. To hold, as does the majority, that our decision earlier this year (*Jackson*, *supra*) and our decision last year (*Askin*, *supra*) are irrelevant, is to say that we intended to make a substantive change in the rule.

appeal before this court is at issue, our rules should be, indeed must be, read so as to eliminate ambiguity—not only for our purposes of administrative ease in fixing finality, but also to avoid denying to a party adversely affected by an agency decision, his day in court. Before our jurisdictional clock begins to run, notice should be *given. Jackson, supra.*

I respectfully dissent.